SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

AMERICAN POWER & LIGHT COMPANY,
PETITIONER,

vs.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 9, 1944.

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fol. 1]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 3966

AMERICAN POWER & LIGHT COMPANY, Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION, Respondent

PETITION OF AMERICAN POWER & LIGHT COMPANY FOR REVIEW OF ORDERS OF THE SECURITIES AND EXCHANGE COMMISSION

(Filed February 5, 1944)

To the United States Circuit Court of Appeals for the First Circuit and the Honorable Judges thereof:

The petition of American Power & Light Company respectfully shows to this Court as follows:

(1) Your petitioner is a corporation organized and existing under the laws of the State of Maine where it has its principal corporate office.

(2) Your petitioner being aggrieved by certain orders of the Securities and Exchange Commission (hereinafter called the "Commission"), dated December 28, 1943 and January 12, 1944, respectively, files this petition under Section 24(a) of the Public Utility Holding Company Act of 1935 (hereinafter called the "Act") 15 U. S. C. A., Sec. 79, [fol. 2] to review and set aside the portions of said orders hereinafter specified. A copy of the order dated December 28, 1943 is annexed to this petition as Appendix A, and a copy of the order dated January 12, 1944 is annexed to this petition as Appendix B.

(3) The nature of the proceedings before the Commission, which resulted in the orders of which review is hereby sought, was as follows:

On July 10, 1941, the Commission issued a Notice and Order for Hearing against Florida Power & Light Company (hereinafter sometimes called "Florida"), your petitioner and Electric Bond and Share Company. In

that Notice and Order the Commission stated that at the hearing particular attention would be directed to certain matters and questions, including the necessity or propriety of requiring Florida to restate its plant and investment, surplus, capital and other accounts, pursuant to Section 15(f) of the Public Utility Holding Company Act of 1935.

On September 17, 1941, Florida and your petitioner, the holder of all of Florida's voting stock, filed with the Commission declarations and applications (File No. 70-403) proposing the refinancing of Florida's 5% First Mortgage Bonds and $7 Preferred Stock through the issuance of new mortgage bonds in an amount less than such 5% First Mortgage Bonds then outstanding and an approximately equal amount of new preferred stock, bearing lesser interest and dividend obligations, respectively.

In connection with, and in furtherance of the proposed refinancing, your petitioner offered to make substantial contributions to the capital of Florida.

The Commission ordered a consolidated hearing on all of the aforesaid matters which was held commencing on September 22, 1941 and which continued to July [fol. 3] 16, 1942 after which Requests for Findings and Conclusions and Briefs were filed and exchanged among counsel.

On December 7, 1943, your petitioner and Florida filed amendments to the applications and declarations previously filed, proposing a refinancing of Florida, restatement of plant, capital, surplus and certain reserve accounts by Florida, such restatement to be made possible in large part through capital contributions by your petitioner varying in amount and detail from those originally offered. The record was reopened, hearings held and the refinancing of Florida accomplished pursuant to the order of December 28, 1943. The Commission, however, by said order imposed upon Florida requirements with respect to the restatement and adjustment of its capital accounts additional to those offered by petitioner and Florida, to wit:

(1) by paragraph (2) of the Commission's order of December 28, 1943, reading as follows:

"It is further ordered that Florida Power & Light Company shall classify in Account 107 and eliminate from the plant account by charge to earned surplus not later than December 31, 1944, an amount of $1,815,655 consisting of capitalized intra-system profits paid to affiliated companies as construction and engineering fees;"

(2) by paragraph (4) of the Commission's order of December 28, 1943, reading as follows:

"It is further ordered that pending final determination of the amount and disposition to be made of Account 100.5 items presently in the plant account of Florida, Florida shall annually beginning with the calendar year 1944 appropriate out of earned surplus to a contingency reserve at least $700,000, such act of appropriation to be without prejudice, however, to respondents' right to contest the validity of any definitive order with respect to such items as may ultimately be issued;"

[fol. 4] These requirements were expressly made separable from the remainder of the order so as to permit separate judicial review thereof.

Your petitioner, the owner of all the common stock of Florida, was a party to and actively participated in every phase of the proceedings before the Commission above mentioned and on January 3, 1944, within the time prescribed by the rules of the Commission, petitioner and Florida filed jointly an application for rehearing of these paragraphs and provisions of said order of December 28, 1943, and on January 12, 1944 the Commission entered its order denying said petition for rehearing.

Petitioner is aggrieved by these said paragraphs of said order of December 28, 1943 and by the denial of the rehearing by said order of January 12, 1944.

(4) The jurisdiction of this Court is invoked under Section 24(a) of the Act, U. S. C. A., Sec. 79.

Your petitioner resides in the State of Maine, which is within the First Judicial Circuit.

(5) The objections of your petitioner to the orders of the Commission of which review is hereby sought are as follows:

(a) Insofar as the portions of the orders, review of which is sought, are purportedly grounded on Sections 15(f) and 20(a) of the Act,

(i) they are unauthorized and beyond the powers conferred upon the Commission by the Act;

(ii) they are unauthorized and beyond the powers conferred upon the Commission by the Act in that they seek to apply retroactively accounting standards not set forth either prospectively or retroactively in the Act and seek to extend the Commission's asserted authority retroactively to the elimination from Florida's ac- [fol. 5] counts of asset items lawfully established in such accounts long prior to the time when the Commission was granted any authority whatever with respect to such accounts;

(iii) they are unauthorized in that they do not constitute the exercise of any power necessarily incidental to the carrying out of any other power expressly conferred upon the Commission and applicable to the rights or interests of your petitioner;

(iv) they constitute an attempt to exercise powers non-existent in the Federal Government in that Florida's operations and the accounts reflecting them are matters not involving interstate or foreign commerce;

(v) they have the effect of restricting the payment to your petitioner of dividends out of Florida's surplus, whereas the Commission has no lawful authority over the declaration and payment of dividends and, in any event, may not disregard and fail to consider, in this connection, the nature of Florida's existing assets; and

(vi) they have the effect of requiring your petitioner, through enforced foregoing of dividends, to pay again for a substantial portion of its interest in Florida, already admittedly paid for by American, whereas the Commission is without power to require such payment;

(b) Sections 15(f) and 20(a) of the Act, and the orders, review of which is sought, are unconstitutional and void in that

(i) Neither Section 15(f) nor 20(a) is a regulation of commerce, nor on the subject of bankruptcies, nor for the establishment of post offices and post roads, within the meaning of the applicable clauses of Article I, Section 8 of the Constitution of the United States, nor within any other power vested in the Congress by said Constitution, but each such section is an invasion of the [fol. 6] powers reserved to the states or the people within the meaning of Article X of the Amendments to the Constitution of the United States in that it seeks to interfere with and control corporations established under State laws, and the exercise by them of their charter powers;

(ii) The enforcement of Section 15(f) and Section 20(a) and of orders made by the Commission thereunder preventing realization by your petitioner of earnings of Florida lawfully available to it as return on funds invested by it in Florida deprive your petitioner of property without due process of law in violation of Article V of the Amendments to the Constitution of the United States; and

(iii) Sections 15(f) and 20(a) of the Act constitute delegations of legislative power to the Commission to formulate and prescribe accounting systems having substantive effects on those to whom they are applied without legislative prescription of standards or definitions confining and directing the Commission in the formulation and prescription of those systems, thus violating Sections 1 and 8 of Article I of the Constitution of the United States; and

(iv) The enforcement of the orders complained of, of Sections 15(f) and 20(a) of the Act, and of related provisions of the Act, deprive petitioner of its property without due process of law in violation of Article V of the Amendments to the Constitution of the United States, constitute delegations of legislative power in violation of Sections 1 and 8 of Article I of the Constitution of the United States, take property for public use without compensation in violation of Article V of

the Amendments to the Constitution of the United States, and constitute ex post facto laws and orders in violation of Section 9 of Article I of the Constitution of the United States.

[fol. 7] (c) Each of the portions of the order, review of which is sought, is arbitrary and capricious and the order and proceedings take petitioner's property without due process of law in violation of Article V of the Amendments to the Constitution of the United States because the evidence in the record shows without contradiction

(i) that the items ordered classified in Account 100.5 (for the elimination of which Florida is required to set aside out of surplus the sum of $700,000 per year) represent payments by your petitioner or by Florida at arm's-length for valuable considerations received by them;

(ii) that the items ordered classified in Account 107 and eliminated represent payments by Florida for value received;

(iii) that the items ordered classified in Account 107 and eliminated were never paid to or received by your petitioner, which is now required by said order to provide for their elimination through foregoing return on its investment;

(iv) that the items ordered classified in Account 107 and eliminated represent fair and reasonable payment for the construction and engineering services received by Florida;

(d) Each of the portions of the order, review of which is sought, is arbitrary and capricious and the order and proceedings take petitioner's property without due process of law in violation of Article V of the Amendments to the Constitution of the United States because there is no evidence in the record

(i) that the items ordered classified in Account 100.5 (for the elimination of which Florida is required to set aside out of surplus the sum of $700,000 per year) [fol. 8] do not represent payments by your petitioner or by Florida at arm's-length for valuable considerations received by them;

(ii) that the items ordered classified in Account 100.5 (for the elimination of which Florida is required to set aside out of surplus the sum of $700,000 per year) are not represented by assets having a value to Florida equal to or greater than the amounts ordered eliminated;

(iii) that the items ordered classified in Account 107 and eliminated do not truly represent payments by Florida for value received;

(iv) that the items ordered classified in Account 107 and eliminated were ever paid to your petitioner, which is now required by said order to provide for their elimination through foregoing return on its investment;

(v) that the items ordered classified in Account 107 and eliminated do not represent fair and reasonable payment for the construction and engineering services received by Florida;

(e) The evidence in the record with respect to the items ordered classified in Account 107 and eliminated is insufficient to support such an order or administrative findings which would form the basis for such an order;

(f) The evidence in the record with respect to the items ordered classified in Account 100.5 and eliminated is insufficient to support such an order or administrative findings which would form the basis for such an order; and

(g) The evidence in the record is insufficient to support the requirement of the orders that Florida, annually beginning with the calendar year 1944, appropriate out of earned surplus to a contingency reserve, at least $700,000.

[fol. 9] Wherefore, your petitioner, American Power & Light Company, respectfully prays (a) that this Honorable Court take jurisdiction over the parties and the subject matter of this petition, (b) that a copy hereof be served upon the respondent Commission, as prescribed by law, (c) that this Honorable Court review paragraphs numbered 2 and 4 of the order of the respondent Commission dated December 28, 1943 and the order of respondent Commission dated January 12, 1944, denying rehearing, respectively, and upon such review set aside the portions of the

said order of December 28, 1943 above specified and the order of January 12, 1944, and (d) that this Honorable Court grant your petitioner such other and further relief as may be deemed just and proper in the premises.

Respectfully submitted, American Power & Light Company. By L. H. Parkhurst, Vice-President.
Attest: D. W. Jack, Secretary (Corporate Seal).
Dated: February 3, 1944.

Reid & Priest, 2 Rector Street New York 6, N. Y.
Attorneys for Petitioner.
A. J. G. Priest, R. A. Henderson, Of Counsel.

[fol. 10] *Duly sworn to by L. H. Parkhurst. Jurat omitted in printing.*

[fol. 11] APPENDIX A TO PETITION

United States of America Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pennsylvania, on the 28th day of December, A. D., 1943.

In the Matter of FLORIDA POWER & LIGHT COMPANY, AMERICAN Power & Light Company, Electric Bond and Share Company. File No. 59-26. Florida Power & Light Company, American Power & Light Company. File No. 70-403. (Public Utility Holding Company Act of 1935).

ORDER

The Commission having instituted proceedings under Sections 11 (b) (2), 12 (b), 12 (c), 12 (f) and 15 (f) of the Public Utility Holding Company Act of 1935 directed to Florida Power & Light Company, an electric and gas utility, its corporate parent, American Power & Light Company, a registered holding company, and Electric Bond and Share Company, also a registered holding company, raising issues therein as to: the existence of substantial write-ups in the plant account; the adequacy of the reserve for retirements and depreciation; the necessity for stopping dividends on preferred and common stocks held by American,

and interest on the debentures owned by American; the ex-
[fol. 12] istence of an unfair and inequitable distribution of voting power among its various classes of security holders, the steps necessary to cure such inequities, if found to exist, including subordination to publicly-held securities of American Power & Light Company's holdings of Florida Power & Light Company's preferred stock and debentures; and the treatment to be afforded certain sums received by American Power & Light Company from Florida Power & Light Company on or about July 1, 1941 as dividends on preferred stock; and

Florida Power & Light Company and American Power & Light Company having filed joint applications and declarations with amendments thereto under Sections 6, 7, 9, 10 and 12 of said Act relating to: the issuance and sale by Florida Power & Light Company to the public of $45,000,000 principal amount of first mortgage bonds and $10,000,000 principal amount of sinking fund debentures pursuant to the competitive bidding requirements of Rule U-50 under the said Act; the issuance and sale of $5,000,000 principal amount of serial notes to certain banks and institutions; the issuance of $5,000,000 principal amount of sinking fund debentures to American Power & Light Company in exchange for $5,000,000 debentures presently held by that company; the surrender by American Power & Light Company to Florida Power & Light Company, as a capital contribution to the latter company, of $17,000,000 principal amount of the debentures, 13,477 shares of the $7 preferred stock, 10,000 shares of the $6 preferred stock, and 20,000 shares of the second preferred stock of the latter company; and the transfer by American Power & Light Company, as a capital contribution to Florida Power & Light Company, of the notes, open account indebtedness, and capital stock of Utilities Land Company (a wholly-owned subsidiary of American Power & Light Company); and these proceedings by Order having been consolidated with the aforesaid proceedings instituted by the Commission; and

[fol. 13] Samuel Okin having filed a request for leave to intervene in the above consolidated proceedings and having requested oral argument and permission to file a brief therein, and having been granted limited participation by the trial examiner; and

Public hearings having been held after appropriate notice and the Commission having considered the record and having made and filed its Findings and Opinion herein;

(1) It is Hereby Ordered pursuant to Sections 15(f) and 20(a) of the Public Utility Holding Company Act of 1935 that Florida Power & Light Company shall make upon its books of account the following adjustments:

(a) Florida shall, by appropriation from earned surplus (including earned surplus made available by transfer from insurance reserve), increase its reserve for property retirements in the amount of $2,400,000 as proposed by Florida;

(b) Florida shall, by charge to earned surplus, eliminate from its plant account the known system write-up therein in the amount of $27,615,043.91;

(c) Florida shall, by charge to earned surplus, eliminate from its plant account interest on excess capacity capitalized therein in the amount of $1,888,067.20;

(d) Florida shall, by charge to earned surplus, eliminate from its plant account capital stock expense capitalized therein in the amount of $114,728.00;

(2) It is Further Ordered that Florida Power & Light Company shall classify in Account 107 and eliminate from the plant account by charge to earned surplus not later than December 31, 1944, an amount of $1,815,655 consisting of capitalized intra-system profits paid to affiliated companies as construction and engineering fees;

[fol. 14] (3) It is Further Ordered that Florida Power & Light Company, as a provision for the disposition of the capitalized intra-system profits ordered in paragraph (2) above to be classified in Account 107 and eliminated from the plant account by charging to earned surplus, shall each month during the calendar year 1944 retain out of, and shall restrict, earned surplus in an amount of not less than one-twelfth (1/12) of $1,815,655 until such time as a total of $1,815,655 shall have been retained and restricted and shall indicate by appropriate footnotes to all published financial statements that its earned surpus is subject to that restriction; compliance with such order so

restricting surplus to be without prejudice to respondents' right to contest the classification of said $1,815,655 in Account 107 and the elimination of such item;

(4) It is Further Ordered that pending final determination of the amount and disposition to be made of Account 100.5 items presently in the plant account of Florida, Florida shall annually beginning with the calendar year 1944 appropriate out of earned surpus to a contingency reserve at least $700,000, such act of appropriation to be without prejudice, however, to respondents' right to contest the validity of any definitive order with respect to such items as may ultimately be issued;

(5) It is Further Ordered that the provisions of paragraphs (2), (3) and (4) above shall be deemed severable from the remaining portions of this order and shall not be deemed conditions to the granting of the applications and the effectiveness of the declarations with respect to the transactions proposed by applicants-declarants which are approved in paragraph (6) hereof;

(6) It is Further Ordered that said applications, as amended, be, and hereby are, granted, and said declarations, as amended, subject to Commission approval by fur- [fol. 15] ther order of the terms of the bond and debenture financing which shall be determined by competitive bidding, and subject to Commission approval by further order of the terms of the serial note issue to be supplied by amendment, be and hereby are, permitted to become effective forthwith, all subject to the terms and conditions contained in Rule U-24, and subject to the further condition that prior to or concurrently with the final closing with respect to the sale of the proposed bonds and debentures American Power & Light Company shall have made the proposed capital contributions to Florida Power & Light Company and Florida Power & Light Company shall have made upon its books of account the accounting adjustments proposed by it and hereinbefore ordered by us to be made in paragraph (1), sub-paragraphs (a), (b), (c) and (d) above.

(7) It is Further Ordered that jurisdiction be, and hereby is, reserved over all fees, commissions, or other remunerations to be paid in connection with the said joint applications and declarations;

(8) It is Further Ordered that the restriction contained in our Order of July 10, 1941, which required American Power & Light Company to retain in a special account the dividends received on or about July 1, 1941 on its holdings of Florida's $7 and $6 preferred stock, is hereby terminated; and

(9) It is Further Ordered that the requests of Samuel Okin for leave to intervene, for oral argument, and for permission to file a brief be, and hereby are, denied.

By the Commission.

Orval L. DuBois, Secretary. (Seal.)

[fol. 16] APPENDIX "B" TO PETITION

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pennsylvania, on the 12th day of January, A. D., 1944

In the Matter of FLORIDA POWER & LIGHT COMPANY, AMERICAN POWER & LIGHT COMPANY, ELECTRIC BOND AND SHARE COMPANY

File No. 59-26

FLORIDA POWER & LIGHT COMPANY, AMERICAN POWER & LIGHT COMPANY

File No. 70-403

(Public Utility Holding Company Act of 1935)

ORDER DENYING REHEARING

The Commission having issued its order herein dated December 28, 1943 (Holding Company Act Release No. 4791) granting applications and permitting declarations to become effective with respect to a proposed recapitalization of Florida Power & Light Company, and approving certain accounting entries to be made on the books of said company;

The Commission by said order having also directed Florida Power & Light Company:

[fol. 17] (a) To classify $1,815,655 in Account No. 107 and to eliminate the same from plant account by charge to earned surplus not later than December 31, 1944; and

(b) To appropriate out of earned surplus a contingency reserve of at least $700,000 annually, pending final determination of the amount and disposition to be made of Account No. 100.5 items presently in the plant account;

The Commission having provided in said order that the requirements described in paragraphs (a) and (b) above should be severable from the remaining portions of said order and should not be deemed conditions to the granting of the applications and the effectiveness of the declarations regarding the transactions approved in said order;

Florida Power & Light Company and American Power & Light Company having filed herein their petition for rehearing with respect to the matter described in paragraphs (a) and (b) above, which petition raises no questions which were not fully considered by the Commission when it formulated its findings and opinion accompanying its aforesaid order; and

It appearing to the Commission that no useful purpose would be served by having a rehearing with respect to the matters in question, it is

Ordered that the aforesaid petition for rehearing be and it hereby is denied.

By the Commission.

Orval L. DuBois, Secretary. (Seal.)

[fol. 18] In United States Circuit Court of Appeals

Minute Entries

On the same day, to wit, February 5, 1944, notice of the filing and a copy of said petition were duly mailed to the respondent, Securities and Exchange Commission.

Thereafter, to wit, on February 10, 1944, acknowledgment of service by counsel for the respondent of the notice of filing of the petition was received and filed.

[fol. 19] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 3966

[Title omitted]

MOTION OF RESPONDENT TO DISMISS PETITION FOR REVIEW—
Filed Feb. 24, 1944

To the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit:

Respondent Securities and Exchange Commission moves this Court to dismiss the petition for review in the above-entitled cause for the reason that it appears from the face of the petition that petitioner is not a "person aggrieved" within the meaning of the provision of Section 24(a) of the Public Utility Holding Company Act of 1935 which is relied on for the Court's jurisdiction.

The Commission does not challenge the right of petitioner's subsidiary Florida Power & Light Company to seek review of this order, which is specifically directed to it. As indicated in paragraph (5) of the Commission's order, those paragraphs of the order which petitioner seeks to review were expressly made severable from certain provisions relating to a refinancing program for Florida. The purpose was to permit consummation of the refinancing without precluding review of the paragraphs specified. Since the question we are raising goes to the jurisdiction [fol. 20] of this Court, and is one which a reviewing court would raise on its own motion, we believe that we should raise it at the outset, by a motion to dismiss. We have given notice of our motion to petitioner in ample time for it to cause its subsidiary to file its petition for review in an appropriate circuit. Oral argument is requested, and since this is a motion which should be disposed of prior to the filing of the transcript, it is respectfully urged that the Court set the motion for argument at the earliest possible date.

As grounds for this motion, respondent respectfully shows:

1. As appears from the order of the respondent, appended to the petition for review, the order in question neither orders petitioner to do anything nor to

refrain from doing anything, and said order does not in any manner operate directly upon petitioner (except that paragraph (8) thereof, not sought to be reviewed, relieved petitioner of a requirement imposed by an earlier order of the respondent; and except that paragraph (6) of the order, not sought to be reviewed, *granted* certain applications and declarations filed by the petitioner).

2. As appears on the face of the petition, the only respect in which petitioner is concerned with paragraphs (2) and (4) of the order (the only paragraphs sought to be reviewed) is by virtue of petitioner's position as owner of all of the stock of Florida Power & Light Company, against which company paragraphs (2) and (4) of the order are directed.

3. Petitioner, as the sole stockholder of Florida Power & Light Company, is not entitled to obtain review of the order of respondent directed to Florida Power & Light Company and is not "aggrieved" thereby merely because in the judgment of petitioner that order may adversely affect the value of petitioner's interest in Florida Power & Light Company. It appears from the face of the petition, and particularly from the objections of the petitioner to the order, that the respects in which the order is complained of all relate to the power of the respondent to make orders with respect to the books and accounts of Florida [fol. 21] Power & Light Company, and to the propriety of the order in so far as the required entries on the books of Florida Power & Light Company are deemed by petitioner to be adverse to the interests of Florida Power & Light Company and to petitioner as a stockholder thereof. None of them relates to any direct concern of petitioner with the order of the respondent.

4. Obviously, a reversal of the order on petitioner's petition would be meaningless unless the effect of the reversal was to relieve Florida Power & Light Co. from the necessity of complying with the order. Therefore, the petition necessarily seeks review of the order in so far as the order is directed against Florida Power & Light Company. But it has not been shown that Florida Power & Light Co. cannot file a petition

for review in its own behalf, or that it will not do so, or that its interests with respect to the order are in any manner in conflict with those of petitioner.

The grounds for respondent's motion to dismiss are more fully stated in a supporting brief appended hereto.

[fol. 22] IN UNITED STATES CIRCUIT COURT OF APPEALS

MINUTE ENTRY

Thereafter, to wit, on April 5, 1944, this cause came on to be heard upon the motion to dismiss,—no transcript having been filed,—and was heard by the Court, Honorable Calvert Magruder, Honorable John C. Mahoney, and Honorable Peter Woodbury, Circuit Judges, sitting.

[fol. 23] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

OPINION ON MOTION TO DISMISS PETITION FOR REVIEW—Filed June 19, 1944

MAGRUDER, J.:

This case is now before us on respondent's motion to dismiss a petition filed in this court by American Power & Light Company under § 24(a) of the Public Utility Holding Company Act of 1935 (49 Stat. 834) to review portions of an order of the Securities and Exchange Commission.
[fol. 24] The Commission on July 10, 1941, instituted proceedings under §§ 11(b)(2), 12(b)(c) and (f) and 15(f) of the Act against Florida Power & Light Company, American Power & Light Company (the present petitioner) and Electric Bond & Share Company. Florida is a public utility company incorporated in the state of Florida and is engaged in the business of supplying electricity and gas to a large number of communities in that state. All the common stock of Florida is held by American, a registered holding company incorporated in the state of Maine. American in turn is controlled by Bond & Share as the top holding company.

The proceedings raised issues as to the existence of substantial write-ups in the plant account of Florida; the adequacy of its depreciation reserve; the necessity for stopping dividends on preferred and common stocks held by American and interest on the debentures owned by American; the existence of an unfair and inequitable distribution of voting power among Florida's various classes of securities and security holders; the steps necessary to cure such inequities, if found to exist, including subordination to publicly held securities of holdings by American of Florida's preferred stock and debentures; and the treatment to be accorded certain sums received by American from Florida on or about July 1, 1941, as dividends on preferred stocks.

By way of partial answer to the matters complained of by the Commission, Florida and American filed joint applications, and subsequent amendments thereto, seeking approval of proposals for recapitalization and refinancing of Florida involving, among other things, certain alterations in the securities of Florida held by American. By order of the Commission these applications were consolidated for hearing with the aforesaid proceedings which had been instituted by the Commission.

On December 28, 1943, the Commission filed its findings, opinion and order in the consolidated proceedings. The [fol. 25] order granted the applications of Florida and American for approval of their proposals for the recapitalization and refinancing of Florida. Except insofar as it granted such applications, the order required no changes in Florida's capital structure or in American's holdings of Florida's securities.

The order did, however, in paragraphs 2 and 4, direct Florida to make certain accounting entries relating to matters not covered by the proposals contained in the applications which had been filed by Florida and American. These two paragraphs of the order are the only ones which American seeks now to have us review in the pending petition. These paragraphs of the order read as follows:

"(2) It is further ordered that Florida Power & Light Company shall classify in Account 107 and eliminate from the plant account by charge to earned surplus not later than December 31, 1944, an amount of $1,815,655 consisting of capitalized intra-system profits paid to affiliated companies as construction and engineering fees; * * *

"(4) It is further ordered that pending final determination of the amount and disposition to be made of Account 100.5 items presently in the plant account of Florida, Florida shall annually beginning with the calendar year 1944 appropriate out of earned surplus to a contingency reserve at least $700,000, such act of appropriation to be without prejudice, however to respondents' right to contest the validity of any definitive order with respect to such items as may ultimately be issued; * * *"

Paragraph 2 of the order, above quoted, relates to certain engineering and construction fees capitalized by Florida in its plant account and paid to Phoenix Utility Company, a wholly owned construction subsidiary of Bond & Share, in connection with the construction of interconnections and additional generating facilities.

Paragraph 4 of the order, above quoted, was based on the fact that American had paid a greater sum for the properties transferred by it to Florida at the latter's organization [fol. 26] than the original cost of those properties to the persons who had first devoted them to public service. The object of the Commission's order was to require Florida ultimately to value the properties transferred to it by American on the basis of the original cost of those properties to such persons. The same object was sought by the Commission with respect to those properties purchased by Florida itself after organization.[1] It was indicated that the adjustment on account of these two items might exceed $10,000,000. With reference to this matter, the Commission stated in its opinion:

"We are cognizant, however, of the fact that the exact amount includible in Account 100.5 has not been finally established and will not be until the original cost study of the company is completed and has been reviewed by us. We believe that in the interests of orderly procedure, the company should be afforded an opportunity to complete its study and to have that study reviewed by us before we take definitive action either with respect to classification in the

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[1] See Kripke, A Case Study in the Relationship of Law and Accounting: Uniform Accounts 100.5 and 107, 57 Harv. L. Rev. 433 (April, 1944); see also *Pacific Power & Light Co.* v. *Federal Power Commission*, 141 F. (2d) 602 (C. C. A. 9th, 1944).

appropriate account or with respect to a formal program of disposition. However, since all present indications are that there will be approximately $10,500,000 of such acquisition adjustments ultimately to be disposed of, conservative accounting requires that the company should begin now to make provision for such disposition. We will therefore order (subject to further order of the Commission in connection with the company's original cost study or otherwise) that commencing in 1944, the company annually appropriate out of earned surplus to a contingency reserve, the sum of at least $700,000, such act of appropriation, however, to be without prejudice to its right to contest the validity of such definitive order with respect to the matter as may ultimately be issued."

Section 24 of the Act, under which American seeks to have [fol. 27] this court review paragraphs 2 and 4 of the Commission's order, reads as follows:

"Sec. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. * * *"

Paragraphs 2 and 4 of the order are directed only to Florida; American is not mentioned therein or required to do anything or refrain from doing anything. No doubt Florida is a "party aggrieved", entitled to have the order reviewed in the appropriate circuit court of appeals. In fact, after the Commission filed its motion to dismiss American's petition at abr, Florida filed in the Circuit Court of Appeals for the Fifth Circuit a petition in substantially identical

terms seeking review of paragraphs 2 and 4 of the Commission's order. The Commission contends, in support of its motion to dismiss, that Florida is the only "party aggrieved" by the order, and that American, whose only interest in the matter is derived through its holding of the common stock of Florida, has no independent standing to seek a review of the order pursuant to § 24 (a).

On the other hand, American contends: "While some of the grounds of objection to the Orders complained of are available to both Florida and American, American is the [fol. 28] party entitled to urge that the appropriations from earned surplus required by the Orders will deprive American of dividends from the money so appropriated. Undoubtedly the Commission will contend that Florida cannot complain that American is being deprived of dividends as a result of the Orders." The Commission denies that its motion to dismiss is a procedural manoeuver designed to block the Florida-American interests out of arguments which should be available to them. In its brief the Commission states that it does not contend that "Florida lacks standing to seek judicial review of an order directing the manner in which it shall keep its accounts, and we recognize that among the matters which may properly be considered on such review is the question whether the order improperly interferes with any right of the corporation to pay dividends and of its stockholders to receive them, and with the value of its outstanding securities." This position counsel for the Commission reaffirmed in a most explicit manner at the oral argument before us.

Upon familiar principles of corporation law, whether a corporation shall institute litigation to enforce a corporate right, like other business questions, is ordinarily a matter of internal management left to the discretion of the directors in the absence of instruction by vote of the stockholders. "Courts interfere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment; and, as a rule, only after application to the stockholders, unless it appears that there was no opportunity for such application, that such application would be futile (as where the wrongdoers control the corporation), or that the delay involved would defeat recovery." *United*

Copper Securities Co. v. *Amalgamated Copper Co.*, 244 [fol. 29] U. S. 261, 263-64 (1917.)[2] The mere fact that the refusal of a corporation, through its management, to engage in litigation, may result in a diminution of dividends to stockholders, does not give a stockholder standing to invoke the aid of a court of equity in overriding the judgment of the management. *Hawes* v. *Oakland*, 104 U. S. 450, 462 (1881).

Consistently with these principles, if the board of directors of Florida had on their own initiative, in good faith and in the exercise of their business judgment, made the accounting changes which paragraphs 2 and 4 of the Commission's order directed Florida to make, a minority stockholder would not have been heard to complain, even though such change resulted in some temporary curtailment of dividends. Whether to contest the Commission's order to this effect is equally a matter of internal corporate management committed in the first instance to the discretion of Florida's board of directors. And, of course, in circumstances like the present, American does not need the aid of a court to compel the assertion of a corporate right, because as controlling stockholder in Florida, American can cause Florida to file a petition for review of the Commission's order.

In *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U. S. 479 (1930), the Interstate Commerce Commission had authorized the New York Central Railroad and other rail carriers to join in establishing a union station at Cleveland through a jointly owned subsidiary. The Wheeling & Lake Erie Railroad had for some years owned and maintained its independent station at Cleveland on the approach [fol. 30] to the union terminal. Wheeling was persuaded to sell its site and become a tenant of the new station at a comparatively low rental, and filed with the Commission an application for authorization to do so. The Pittsburgh & West Virginia Railway, a minority stockholder in Wheel-

[2] This principle is embodied now in Rule 23(b) of the Federal Rules of Civil Procedure. While Rule 23(b) is applicable only to district courts, we see no reason why the accepted principle, which antedated Rule 23(b), should not be applicable to review in the circuit courts of appeals under § 24 (a) of the Public Utility Holding Company Act.

ing, intervened and was heard before the Commission in opposition to the plan on various grounds, one of which was that it might imperil Wheeling's financial condition. The Commission, however, approved the plan, and Pittsburgh brought suit in a three-judge district court under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219-20, to suspend and set aside the Commission's order. The District Court denied relief on the merits; upon appeal the Supreme Court held that Pittsburgh had no standing to sue and that the bill should have been dismissed without inquiry into the merits. Justice Brandeis, speaking for the court, said (at p. 487):

"'Finally, the claim that the order threatens the Wheeling's financial stability, and consequently appellant's financial interest as a minority stockholder is not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order. This financial interest does not differ from that of every investor in Wheeling securities or from an investor's interest in any business transaction or lawsuit of his corporation. Unlike orders entered in cases of reorganization, and in some cases of acquisition of control of one carrier by another, the order under attack does not deal with the interests of investors. The injury feared is the indirect harm which may result to every stockholder from harm to the corporation. Such stockholder's interest is clearly insufficient to give the Pittsburgh a standing independently to institute suit to annul this order.''

Pittsburgh & West Virginia Ry. Co. v. *United States* was recently cited with approval in *Boston Towboat Co.* v. *United States,* decided by the Supreme Court April 3, 1944. See also *United Copper Securities Co.* v. *Amalga-*
[fol. 31] *mated Copper Co.,* 244 U. S. 261 (1917); *Westmoreland Asbestos Co., Inc.* v. *Johns-Manville Corp.,* 30 F. Supp. 389 (S. D. N. Y., 1939), affirmed on opinion below, 113 F. (2d) 114 (C. C. A. 2d, 1940); *NY Pa NJ Utilities Co.* v. *Public Service Commission,* 23 F. Supp. 313 (S. D. N. Y. 1938).

It is true that the Urgent Deficiencies Act, under which review of the order of the Interstate Commerce Commission was sought in *Pittsburgh & West Virginia Ry. Co.* v. *United States,* does not provide, as does § 24 (a) of the

Public Utility Holding Company Act, that "any person or party aggrieved" may seek a review of the administrative order, but leaves the moving party's standing to seek review to be determined upon general principles. But the phrase "any person or party aggrieved" is not one of exact meaning; and we have no reason to think that Congress thereby intended to confer upon a stockholder the independent right to seek a review of the type of administrative order, directed only against the corporation, involved in the case at bar. It may be that so far as concerns the constitutional requirement of "case" or "controversy" Congress might have power to disregard the "corporate veil," to treat the controversy as one subsisting between the Commission and the stockholders of the corporation which has been ordered by the Commission to make the accounting changes here involved, and to confer upon such stockholders the independent right, in their own names, to seek review of the Commission's order. But we think it is clear that if Congress had intended any such departure from the ordinary principles of corporation law, it would have expressed such intention in explicit language.

In applying to the case at bar the phrase "any person or party aggrieved," it is immaterial that American was a party to the administrative proceedings before the Commission. *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U. S. 479, 486 (1930); *Alexander Sprunt & Son, Inc.* v. *United States*, 281 U. S. 249, 254-55 (1930). Under § 19 of the Public Utility Holding Company Act, 49 Stat. 832, the Commission has broad discretion in admitting interested persons as parties to the administrative proceedings, but it by no means follows that all persons who properly participate as interested parties in the administrative proceedings are "parties aggrieved" within the meaning of the review provisions in § 24 (a). As a matter of fact, in view of the inclusive nature of the issues projected in the proceedings initiated by the Commission in the present case, American was necessarily made a party respondent, because, among other things, one of the issues raised was whether it was necessary to subordinate to publicly held securities of Florida the holdings by American of Florida's preferred stock and debentures. But so far as concerns paragraphs 2 and 4 of the Commission's order, which are the only portions of the order now sought

to be reviewed, proceedings to that end could have been instituted by the Commission against Florida alone, without joining American as a party respondent.

We shall refer briefly to some of the cases relied upon by petitioner.

In *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U. S. 119 (1944), the Commission made an accounting order against Northwestern Electric Company, an operating utility all of whose common shares are owned by American Power & Light Company. Northwestern filed in the proper circuit court of appeals a petition to review the order. American joined in the application for court review. Since the particular circuit court of appeals undoubtedly had jurisdiction to review the order there was no point in challenging American's standing to join in the petition, and the Commission made no such challenge. Neither in the opinion of the circuit court of appeals nor in that of the Supreme Court was there any discussion [fol. 33] of the question whether American had an independent standing to seek review of the accounting order against the corporation of which it was the controlling stockholder.

In *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470 (1940), one holding a license to operate a broadcasting station, over whose objection the Commission had granted a permit for the erection of a rival station, was held to be a "person aggrieved or whose interests are adversely affected" by the decision of the Commission, within the meaning of § 402 (b)(2) of the Communications Act of 1934, 48 Stat. 1064, 1093, and hence entitled to appeal from the Commission's decision to the Court of Appeals of the District of Columbia. The private economic injury which the said licensee suffered as a result of the Commission's decision was deemed sufficient to give the licensee a standing, as a sort of "private attorney general,"[3] to present questions of public interest and convenience on appeal from the order of the Commission. The court pointed out (at p. 477) that it ascribed this meaning to the flexible phrase "person aggrieved or whose interests are adversely affected" in order to effectuate the

[3] See Douglas, J., dissenting, in *Federal Communications Commission* v. *National Broadcasting Co., Inc.*, 319 U. S. 239, 265, note 1 (1943).

purposes of the particular statute and because, otherwise, § 402 (b) (2) would be deprived of any substantial effect. No comparable situation is presented in the case at bar. Neither in the *Sanders* case, *supra*, nor in the *Federal Communications Commission* v. *National Broadcasting Co., Inc.*, 319 U. S. 239 (1943), nor in *Associated Industries, Inc.* v. *Ickes*, 134 F. (2d) 694 (C. C. A. 2d, 1943), was the question presented whether a stockholder is a "person or party aggrieved" by an accounting order directed solely against the corporation, an order which the corporation is fully empowered to bring for review before the appropriate circuit court of appeals.

[fol. 34] In *Todd* v. *Securities and Exchange Commission*, 137 F. (2d) 475 (C. C. A. 6th, 1943), the standing of a stockholder to seek review of a dissolution order pursuant to § 11 (b) (2) of the Public Utility Holding Company Act was not challenged by the Commission, and the court's decision makes no allusion to the point.

In *Okin* v. *Securities and Exchange Commission*, 137 F. (2d) 398 (C. C. A. 2d, 1943), a stockholder sought review of an order of the Commission granting an application by the corporation for authority to sell the securities of a wholly owned subsidiary. The stockholder had appeared before the Commission in opposition to the application, charging fraud, and after being allowed a limited participation in the hearing, he was eventually ordered by the examiner to leave the room, and upon his refusal the examiner closed the hearing. The court stated that the only question before it was "whether, as petitioner so strenuously asserts, he was denied the essentials of a fair hearing." If the stockholder was entitled to be heard before the Commission on his charges of fraud, and had been denied the essentials of a fair hearing, it may well be that he should be deemed a person aggrieved by the ensuing order of the Commission. The court after examination of the record of the administrative proceedings concluded "that no error which could possibly affect the result occurred" and affirmed the Commission's order.

Finally, the petitioner relies heavily on our decision in *Lawless* v. *Securities and Exchange Commission*, 105 F. (2d) 574 (1939). In that case, as this court understood the Commission's order, its effect was to cast doubt upon the validity of the new common stock and common stock purchase warrants which would be issued to petitioner in

pursuance of a proposed recapitalization. In such a case a minority stockholder whose rights are affected is a person aggrieved by the Commission's order within the meaning [fol. 35] of § 24 (a), and has an independent standing to seek judicial review. Insofar as the language of the *Lawless* opinion may intimate that the petitioner was a "person or party aggrieved" merely by virtue of the fact that he had been admitted to participation in the proceedings before the Commission, we do not think that it is correct.

Respondent's motion to dismiss the petition for review is granted, and the petition is dismissed for lack of jurisdiction.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER—June 19, 1944

This cause came on to be heard April 5, 1944, upon petition for review of an order of the Securities and Exchange Commission, and a motion by respondent to dismiss the petition for review, and was argued by counsel.

Upon consideration whereof, It is now, to wit, June 19, 1944, here ordered as follows: Respondent's motion to dismiss the petition for review is granted, and the petition is dismissed for lack of jurisdiction.

By the Court, (S.) Roger A. Stinchfield, Chief Deputy Clerk.

[fol. 36] Clerk's Certificate to transcript omitted in printing.

[fol. 37] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.